A

# Lim Plantation Co Sdn Bhd v Public Prosecutor

B HIGH COURT (PENANG) — CRIMINAL APPEAL NO PA-42S-4–03 OF 2021
MOHD RADZI ABDUL HAMID JC
9 MARCH 2022

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant found guilty and sentenced for carrying out unauthorised earthworks — Whether prosecution failed to prove that on date specified in charge, there was earthworks by appellant — Whether the charge was wrong in law — Whether works undertaken by appellant were actually soil mitigation works which did not* D *include cutting of slopes — Whether quarry which had operated on lands were approved by authorities — Whether approved quarry works necessarily included slope cutting works which were not illegal — Whether there was miscarriage of justice — Whether trial judge applied wrong standard of proof — Street, Drainage and Building Act 1974 s 70A*

E

This was an appeal by the appellant against both conviction and sentence. The appellant was charged for an offence under s 70A(1) of the Street, Drainage and Building Act 1974 ('the Act') punishable under s 70A(9) of the Act. The appellant was found guilty at the end of the trial and was sentenced to payment F of fine in the amount of RM15,000. It was the prosecution's case that on 18 October 2019, the appellant had permitted earthworks to be carried out that included cutting of slopes on lot 527 and 581, Mukim 2, Daerah Barat Daya, Pulau Pinang ('the lands') without the written approval of the local authority, the City Council of Penang Island ('MBPP'). The evidence was G introduced via PW1, who was the assistant director, Penang Land and Mines Department, that the appellant was the registered owner of both lands. The fact of ownership was not disputed by the appellant. PW2 and PW4 conducted an investigation regarding unauthorised cutting of slopes on the lands. PW2 testified that based on the aerial photographs, it was evident that there were H unauthorised earthworks, in particular cutting of slopes on the lands. Aerial photographs were taken using a drone as earlier attempts to enter the lands were unsuccessful as the entry to the lands were closed. PW4 had tendered survey plans where the highlighted parts indicated the area on the lands where the unauthorised earthworks and cutting of slope were carried out. It was the I case for the appellant that: (a) the works carried out by the appellant were not earthworks that involved cutting of slopes but were just oil mitigation works to mitigate the risk of soil erosion that might affect adjacent lands; (b) that there were no actual earthworks and slope cutting done on 18 October 2019 and what PW2 and PW4 saw were just remnant of works left by quarry works on

the lands which had ceased operations; and (c) the alleged slopes were actually works ancillary to the operation of quarry on the lands which were approved by the Department of Land and Mines and therefore were not illegal works. The learned sessions court judge found that the appellant had failed to raise any reasonable doubt in the prosecution's case and that the prosecution had proven its case against the appellant beyond a reasonable doubt. On appeal, the appellant argued that: (i) that the prosecution failed to prove that on the date specified in the charge, there was in fact earthworks involving cutting of slopes being undertaken by the appellant; (ii) that the works undertaken by the appellant were actually soil mitigation works which did not include cutting of slopes; (iii) that the quarry which had operated on the lands were approved by the authorities; (iv) that the approved quarry works necessarily included slope cutting works and therefore were not illegal; and (v) there was a miscarriage occasioned on the appellant caused by the error on the part of learned sessions court judge in applying the wrong standard of proof at the end of the defence case.

**Held**, dismissing the appeal:

(1) Notwithstanding that the environmental audit report (exh D17) showed that the quarry was operated by a different entity, all operations at the quarry including any earthworks must have been undertaken with the permission of the appellant as the registered owner of the lands. Thus, s 70A of the Act applied to the appellant whether or not the quarry was actually operated by the appellant (see para 27).

(2) Section 70A of the Act made any earthwork which were carried out or permitted to be carried out without an approval from MBPP, illegal work. The words '... permit to be commenced or carried out any earthworks ...' were not restricted only to works that were found to be actively carried out on the date of specific in a charge but also included works that were found by the authorities on that date to have been carried out or permitted to be carried out by the owner of the land or its contractor. It must be the intention of the legislator that the provision of s 70A of the Act as a measure to control illegal earthworks that might pose risks to the environment and the public operated to cover not only illegal earthworks that were found actually being done on the date specified in the charge but also extended to similar works done before its discovery. Only then would the law be effective in deterring would-be offenders from committing such an offence. It was sufficient for the prosecution to prove that on the date of the charge, illegal earthworks were permitted to be carried out by the land owner or his contractor whether such works were found to be actively carried out on that date or had been carried out and completed at some earlier date. In the latter case, the discovery of the illegal earthworks on the date as specified in the charge would constitute the date of the offence. The court found no cause to find that the charge

was wrong in law for want of evidence of any earthworks actually undertaken by the appellant on the date specified in the charge (see paras 31–32).

(3) SD1's oral evidence that the slope cutting discovered by PW2 and PW3 were actually remnants of the quarry operations that had since ceased not supported by any other evidence. No witness with qualifications equivalent to PW2 and PW3 was called to challenge the findings of PW2 and PW3 that the works discovered by them were not earthworks within the meaning of s 70(18) of the Act, that they were wrong in finding that the earthworks were cutting of slopes and that the alleged earthworks were not new. The court could not agree with SD1's evidence that the soil mitigation works undertaken at the relevant time did not require any approval from MBPP. The court found no reason to agree with the appellant that exhibited D15 and D16 proved that there were no earthworks involving slope cutting and that in any event, the earthworks were actually soil mitigation works. It was pertinent to note that at the conclusion of the re-examination, SD1 agreed that earthworks were in fact carried out on the lands. The court was of the view that there was no credible defence to the charge and SD1's sole evidence could not raise any reasonable doubt in the prosecution's case. The court could not disagree with the findings of the sessions court judge at the end of the trial that the appellant had failed to raise any reasonable doubt in the prosecution's case. The appellant had also failed to rebut on the balance of probabilities the presumption of permission by the land owner under s 70A(14) of the Act (see paras 37–40).

(4) On the issue of whether sessions court judge had applied the wrong standard of proof at the end of the trial, the court agreed that words used by the sessions court judge had caused confusion on what exactly the standard of proof applied was. It was established law that needed no repeating that the legal burden of proof of an accused at the end of the trial was to just raise a reasonable doubt in the prosecution. The sessions court judge had wittingly or unwittingly fused two different legal burdens of proof on the appellant, that was: (a) raising a reasonable doubt; and (b) on a balance of probabilities. It was obvious that employing the latter raised the burden of the appellant's to one that was higher than just raising reasonable doubt. On that premise, there was indeed a misdirection by the sessions court judge (see para 41).

(5) The court did not find that the appellant had suffered any miscarriage of justice. The sessions court judge had evaluated all the evidence as required as the trial judge and the appellant had received a fair trial. Applying the correct standard of proof, the court was satisfied that the appellant had failed to raise any reasonable doubt in the prosecution's

case at the conclusion of the trial and that the prosecution had proven its case beyond a reasonable doubt against the appellant in accordance with the charge (see para 44).

**[Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu terhadap sabitan dan hukuman. Perayu telah didakwa atas kesalahan di bawah s 70A(1) Akta Jalan, Parit dan Bangunan 1974 ('Akta tersebut') yang boleh dihukum di bawah s 70A(9) Akta yang sama. Perayu didapati bersalah pada akhir perbicaraan dan dijatuhkan hukuman denda sejumlah RM15,000. Ia adalah menjadi kes pendakwaan bahawa pada 18 Oktober 2019, perayu telah meluluskan kerja tanah dijalankan termasuk pemotongan cerun di lot 527 dan 581, Mukim 2, Daerah Barat Daya, Pulau Pinang ('tanah tersebut') tanpa kelulusan bertulis pihak berkuasa tempatan, Majlis Bandaraya Pulau Pinang ('MBPP'). Keterangan tersebut dikemukakan melalui PW1, yang merupakan penolong pengarah, Jabatan Tanah dan Galian Pulau Pinang, bahawa perayu adalah pemilik berdaftar kedua-dua tanah tersebut. Fakta pemilikan tidak dipertikaikan oleh perayu. PW2 dan PW4 menjalankan siasatan berhubung pemotongan cerun tanpa kebenaran di tanah tersebut. PW2 memberi keterangan bahawa berdasarkan gambar udara, adalah jelas bahawa terdapat kerja tanah yang tidak dibenarkan, khususnya pemotongan cerun di atas tanah tersebut. Gambar udara diambil menggunakan dron kerana percubaan awal untuk memasuki tanah tersebut tidak berjaya kerana laluan masuk ke tanah tersebut ditutup. PW4 telah mengemukakan pelan ukur di mana bahagian yang ditandakan menunjukkan kawasan di tanah di mana kerja tanah dan pemotongan cerun yang tidak dibenarkan dijalankan. Ia adalah menjadi kes bagi perayu bahawa: (a) kerja-kerja yang dijalankan oleh perayu bukanlah kerja tanah yang melibatkan pemotongan cerun tetapi hanyalah kerja-kerja tebatan tanah untuk mengurangkan risiko hakisan tanah yang mungkin menjejaskan tanah bersebelahan; (b) bahawa tiada kerja tanah dan pemotongan cerun sebenar dilakukan pada 18 Oktober 2019 dan apa yang PW2 dan PW4 lihat hanyalah tinggalan kerja-kerja yang ditinggalkan oleh kerja-kerja kuari di atas tanah yang telah berhenti beroperasi; dan (c) cerun yang dipersoal sebenarnya adalah kerja sampingan kepada operasi kuari di atas tanah yang diluluskan oleh Jabatan Tanah dan Galian dan oleh itu bukanlah kerja haram. Hakim mahkamah sesyen yang bijaksana mendapati perayu telah gagal menimbulkan sebarang keraguan munasabah dalam kes pendakwaan dan bahawa pihak pendakwaan telah membuktikan kesnya terhadap perayu melebihi keraguan munasabah. Semasa rayuan, perayu berpendapat bahawa: (i) bahawa pihak pendakwaan gagal membuktikan bahawa pada tarikh yang dinyatakan dalam pertuduhan, sebenarnya terdapat kerja tanah yang melibatkan pemotongan cerun yang dilakukan oleh perayu; (ii) bahawa kerja-kerja yang dilakukan oleh perayu sebenarnya adalah kerja-kerja tebatan tanah yang tidak termasuk pemotongan cerun; (iii) bahawa kuari yang telah beroperasi di atas tanah tersebut telah diluluskan oleh pihak berkuasa; (iv) bahawa kerja kuari yang

A diluluskan semestinya termasuk kerja pemotongan cerun dan oleh itu tidak menyalahi undang-undang; dan (v) terdapat ketidakadilan yang berlaku pada perayu disebabkan oleh kekhilafan di pihak hakim mahkamah sesyen yang bijaksana dalam menggunakan standard pembuktian yang salah pada akhir kes pembelaan.

B

**Diputuskan**, menolak rayuan:

(1) Walaupun laporan audit alam sekitar (eksh D17) menunjukkan bahawa kuari dikendalikan oleh entiti yang berbeza, semua operasi di kuari
C termasuk mana-mana kerja tanah mestilah telah dijalankan dengan kebenaran perayu sebagai pemilik berdaftar tanah. Oleh itu, s 70A Akta terpakai kepada perayu sama ada kuari tersebut sebenarnya dikendalikan oleh perayu atau tidak (lihat perenggan 27).

D (2) Seksyen 70A Akta tersebut telah menyatakan bahawa apa-apa kerja tanah yang dijalankan atau dibenarkan untuk dijalankan tanpa kelulusan daripada MBPP, kerja haram. Perkataan '... dibenarkan untuk dimulakan atau dijalankan apa-apa kerja tanah ...' tidak terhad hanya kepada kerja-kerja yang didapati giat dijalankan pada tarikh tertentu dalam
E pertuduhan tetapi juga termasuk kerja-kerja yang didapati oleh pihak berkuasa pada tarikh tersebut telah dijalankan atau dibenarkan untuk dijalankan oleh pemilik tanah atau kontraktornya. Semestinya menjadi hasrat penggubal undang-undang bahawa peruntukan s 70A Akta sebagai langkah mengawal kerja tanah haram yang mungkin
F mendatangkan risiko kepada alam sekitar dan orang ramai beroperasi untuk melindungi bukan sahaja kerja tanah haram yang didapati benar-benar dilakukan pada tarikh yang dinyatakan dalam pertuduhan tetapi juga diperluaskan kepada kerja serupa yang dilakukan sebelum dapatannya. Hanya dengan itu undang-undang akan berkesan dalam
G menghalang bakal pesalah daripada melakukan kesalahan tersebut. Ia adalah mencukupi bagi pihak pendakwaan membuktikan bahawa pada tarikh pertuduhan, kerja tanah haram dibenarkan dijalankan oleh pemilik tanah atau kontraktornya sama ada kerja tersebut didapati giat dijalankan pada tarikh tersebut atau telah dijalankan dan siap pada tarikh
H lebih awal. Dalam kes kedua, dapatan kerja tanah haram pada tarikh seperti yang dinyatakan dalam pertuduhan akan membentuk tarikh kesalahan tersebut. Mahkamah tidak menemui sebarang sebab untuk mendapati bahawa pertuduhan tersebut salah di sisi undang-undang kerana ketiadaan keterangan tentang sebarang kerja tanah yang
I sebenarnya dilakukan oleh perayu pada tarikh yang dinyatakan dalam pertuduhan (lihat perenggan 31–32).

(3) Keterangan lisan SD1 bahawa pemotongan cerun yang didapati oleh PW2 dan PW3 sebenarnya adalah sisa-sisa operasi kuari yang telah berhenti tidak disokong oleh sebarang keterangan lain. Tiada saksi yang

mempunyai kelayakan yang setara dengan PW2 dan PW3 dipanggil untuk mencabar dapatan PW2 dan PW3 bahawa kerja-kerja yang ditemui oleh mereka bukanlah kerja tanah dalam pengertian s 70(18) Akta tersebut, bahawa mereka salah dalam mendapati bahawa kerja tanah tersebut adalah pemotongan cerun dan kerja tanah yang dipersoal bukan baru. Mahkamah tidak bersetuju dengan keterangan SD1 bahawa kerja-kerja tebatan tanah yang dijalankan pada masa yang berkaitan tidak memerlukan sebarang kelulusan daripada MBPP. Mahkamah mendapati tiada sebab untuk bersetuju dengan perayu yang mengemukakan D15 dan D16 membuktikan bahawa tiada kerja tanah yang melibatkan pemotongan cerun dan dalam apa jua keadaan, kerja tanah tersebut sebenarnya adalah kerja-kerja tebatan tanah. Ia adalah penting untuk diambil perhatian bahawa pada akhir pemeriksaan semula, SD1 bersetuju bahawa kerja tanah sebenarnya dijalankan di atas tanah tersebut. Mahkamah berpendapat bahawa tiada pembelaan yang boleh dipercayai terhadap pertuduhan tersebut dan bukti tunggal SD1 tidak boleh menimbulkan sebarang keraguan munasabah dalam kes pendakwaan. Mahkamah tidak boleh tidak bersetuju dengan dapatan hakim mahkamah sesyen pada akhir perbicaraan bahawa perayu telah gagal menimbulkan sebarang keraguan munasabah dalam kes pendakwaan. Perayu juga telah gagal untuk menyangkal imbangan kebarangkalian anggapan kebenaran oleh pemilik tanah di bawah s 70A(14) Akta (lihat perenggan 37–40).

(4) Mengenai isu sama ada hakim mahkamah sesyen telah menggunakan standard pembuktian yang salah pada akhir perbicaraan, mahkamah bersetuju bahawa perkataan yang digunakan oleh hakim mahkamah sesyen telah menyebabkan kekeliruan tentang apa sebenarnya standard pembuktian yang digunakan. Ia adalah undang-undang mantap yang tidak perlu diulangi bahawa beban undang-undang pembuktian seseorang tertuduh pada akhir perbicaraan adalah untuk menimbulkan keraguan munasabah dalam pendakwaan. Hakim mahkamah sesyen telah dengan sengaja atau tidak sengaja menggabungkan dua beban pembuktian undang-undang yang berbeza ke atas perayu, iaitu: (a) menimbulkan keraguan munasabah; dan (b) pada imbangan kebarangkalian. Jelas sekali bahawa menggunapakai yang selanjutnya telah meningkatkan beban perayu kepada beban yang lebih tinggi daripada hanya menimbulkan keraguan munasabah. Atas premis tersebut, memang terdapat salah arah oleh hakim mahkamah sesyen (lihat perenggan 41).

(5) Mahkamah tidak mendapati bahawa perayu telah mengalami apa-apa ketidakadilan. Hakim mahkamah sesyen telah menilai kesemua keterangan seperti yang diperlukan sebagai hakim bicara dan perayu telah menerima perbicaraan yang adil. Dengan menggunakan standard pembuktian yang betul, mahkamah berpuas hati bahawa perayu telah

gagal menimbulkan sebarang keraguan munasabah dalam kes pendakwaan pada akhir perbicaraan dan bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah terhadap perayu mengikut pertuduhan (lihat perenggan 44).]

**Cases referred to**

*Azhar bin Lazim v PP* [2012] 5 MLJ 1; [2012] 1 LNS 262, CA (refd)
*Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169; [1991] 3 CLJ, SC (refd)
*Mohd Yusri bin Mangsor & Anor v PP and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897, CA (refd)
*PP v Ishak bin Hj Shaari & other appeals* [2003] 4 MLJ 585; [2003] 3 CLJ 843, CA (folld)
*Tunde Apatira & Ors v PP* [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (folld)
*Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai* [2019] MLJU 1172; [2020] 1 CLJ 34, FC (folld)

**Legislation referred to**

Criminal Procedure Code s 153(1)
Interpretation Acts 1948 and 1967 s 17A
Street, Drainage and Building Act 1974 ss 70(18), 70A, 70A(1), (9), (14), (18)

*Simon Murali (Simon Murali & Co) for the appellant.*
*Rais lmran bin Hamid (Deputy Public Prosecutor, Penang State Legal Advisor's Office) for the respondent.*

**Mohd Radzi Abdul Hamid JC:**

MATTER BEFORE THIS COURT

**[1]** This an appeal by the appellant against both conviction and sentence. The appellant was charged for an offence under s 70A(1) of the Street, Drainage and Building Act 1974 ('Act') punishable under s 70A(9) of the Act. The appellant was found guilty at the end of the trial and was sentenced to payment of fine in the amount of RM15,000.

**[2]** The charge ('charge') is as follows:

Bahawa kamu Lim Plantation Company Sendirian Berhad (No Syarikat: 10745-K) sebagai pemunya berdaftar Lot 527 dan 581, Mukim 2, Daerah Barat Daya, Pulau Pinang dipertuduhkan bahawa kamu pada 18.10.2019 telah membenarkan supaya dijalankan suatu kerja tanah yakni:- menyentuh tanah dengan memotong cerun bukit di atas lot tersebut tanpa mendapat kelulusan bertulis daripada Pihak Berkuasa Tempatan iaitu Majlis Bandaraya Pulau Pinang bersalahan dengan

Seksyen 70A(1) Akta Jalan, Parit dan Bangunan 1974 dan dengan ini anda telah melakukan kesalahan yang mana boleh dihukum di bawah Seksyen 70A(9) Akta yang sama.

BRIEF FACTS OF THE TRIAL

*Prosecution stage*

**[3]** It was the prosecution's case that on 18 October 2019 the appellant had permitted to be carried out earthworks that included cutting of slopes on Lot 527 and 581, Mukim 2, Daerah Barat Daya, Pulau Pinang ('lands') without the written approval of the local authority, namely the City Council of Penang Island ('MBPP').

**[4]** Evidence was introduced via PW1 (assistant director, Penang Land and Mines Department) that the appellant is the registered owner of both lands. The fact of ownership was not disputed by the appellant.

**[5]** Material evidence on the alleged earthworks, in particular the cutting of slopes on the lands were given by PW2 (assistant engineer, geotechnical unit, MBPP), PW3 (senior geotechnical engineer, MBPP) and PW4 (surveyor from Perunding Ukur Juara).

**[6]** PW2 gave evidence that on 18 October 2019 he and PW4 conducted an investigation regarding unauthorised cutting of slopes on the lands. Aerial photographs were taken and tendered as exhs P6A to P6D and P7A to P7D ('aerial photographs'). In his evidence PW2 testified that based on those aerial photographs it was evident that there were unauthorised earthworks, in particular cutting of slopes on the lands. The aerial photographs were taken using a drone as earlier attempts to enter the lands were unsuccessful as the entry to the lands were closed.

**[7]** PW3 testified that there was no written authorisation for the cutting of the slopes. Based on earlier visits to the lands, the aerial photographs and report he received from PW2, PW3 was satisfied earthworks in the form of cutting of slopes were being carried out on the lands. Letters marked as exhs P13 and P14 issued by MBPP and identified by PW3 showed that MBPP had issued a stop work notice effecting the to the appellant on 14 February 2019 and later a warning letter on the appellant's failure to comply with the stop work notice was issued on 24 September 2019. Both notices were in relation to earthworks done on various lands owned by the appellant including the lands. According to PW3 the appellant had failed to comply with the said notices. PW3 disagreed to a suggestion made by the appellant that the works carried out on the lands were actually soil mitigation works and not cutting of slopes. PW3

testified that even if the area where the slopes were cut were part of the operations of a licensed granite quarry as put by the defence, any cutting of slope constituted earthworks for which an approval from MBPP must be first obtained.

**[8]** PW4 had prepared survey plans tendered as exhs P10 and P11 ('plans'). In those plans the highlighted parts indicated the area on the lands where the unathorised earthworks and cutting of slopes were carried out. P4 also testified that he had visited the relevant lands and saw the areas where the earthworks and cutting of slope were undertaken. PW4 denied that the plans were not pertaining to the lands.

**[9]** It was the case for the appellant that: (a) the works carried out by the appellant were not earthworks that involved cutting of slopes but were just soil mitigation works to mitigate risk of soil erosion that may affect adjacent lands; (b) that there were no actual earthworks and slope cutting done on 18 October 2019 and what PW2 and PW4 saw were just remnant of works left by quarry works on the lands which had ceased operations; and (c) the alleged slopes were actually works ancillary to the operation of quarry on the lands which were approved by the Department of Land and Mines and therefore were not illegal works.

**[10]** On the first issue it was put to PW4 the works that MBPP were complaining of were actually soil mitigation works carried out by the appellant to mitigate effects of soil erosion on the lands. Letters marked as exhs D15 and D16 were shown by the defence to PW4. Exhibit D16 was a letter from the appellant to MBPP informing them of the mitigation works being carried out and that the appellant had proposed to submit earthwork plans to MBPP for approval. Exhibit D15 was MBPP's reply to exh D16 wherein MBPP had welcomed the mitigation works and stated conditions for the submissions for plans for approval and supervision of works. To a suggestion by the defence that by exh D15 MBPP had recognized and accepted that the works carried out by the appellant were actually mitigation works and not earthworks involving cutting of slopes, PW3 testified that the said letter did not amount to a recognition as suggested but that MBPP merely took cognisance of the works carried out by the appellant. Those works were still subject to approval for which the appellant had still failed to secure any approval.

**[11]** On the second issue, it was put to PW2 and PW3 that they did not see any works as specified in the charge being done on that date. It was suggested that the alleged earthworks and slopes that they saw in exhs P6 dan P7 were remnants of ancillary works that were done when a quarry was still in operation on the lands until it ceased operations in 1998. In response to that issue, both

PW2 and PW3 maintained that there were earthworks still being carried out on the lands and that those earthworks were done without any approval from MBPP.

**[12]** On the third issue, both PW2 and PW3 were not aware that there had been a quarry operation on the lands and that such quarry had operated with the necessary approvals from the Department of Land and Mines. Notwithstanding that, both witnesses testified that earthwork approvals were separate and distinct from approvals for the operation of quarry. Whilst the approvals for the operation of quarry came under the authority of the Department of Land and Mines, any earthwork to be undertaken connected to the operation of quarry required approvals from the MBPP.

*Defence stage*

**[13]** Only one witness was called for the appellant and he was the site manager for the appellant since 2D15 until the quarry ceased operation in 1998. In his evidence DW1 testified that there had not been any earthworks and cutting of slopes on the lands since the quarry ceased operation since 1998. The slopes seen by PW2 and PW3 were actually remnants of earthwork and slope cutting when the quarry was in operation. An environmental audit report dated 28 October 1996 proving the history of the operation of the quarry was tendered and marked as exh D17.

**[14]** DW1 further testified that the works being carried out were just soil mitigating works to control the effects of rock blasting done during the operation of the quarry. Rock blasting at the quarry had caused soils to become loose and if no mitigation work was done it could cause siltation and flooding. DW1 added that no approvals were required for mitigation works.

**[15]** When challenged by the prosecution in cross-examination, DW1 did not agree that the earthworks were recent and that the appellant did not secure any approval for the same. With regards to exh D15, he stated that the appellant could not comply with requirements of MBPP due to the Covid-19 pandemic which had struck the country after that letter was issued.

DECISION OF TRIAL COURT

**[16]** The grounds of the learned sessions court judge ('SCJ') appears in Vol 1 of the record of appeal.

**[17]** At the end of prosecution case, the learned SCJ found that, inter alia: (a) the appellant is the registered owner of the lands; (b) the evidence of PW2, PW3 and PW4 regarding the alleged earthworks involving the cutting of slopes

were consistent and mutually corroborative; (c) there was no application for approval by the appellant to undertake the said earthworks; (d) exhs P6 and P7 clearly showed earthworks that involved slope cutting; and (e) even if the works were mitigation works as suggested by the defence, there was still a failure by the appellant to secure the necessary approvals. In conclusion the learned SCJ was satisfied that the prosecution had proven a prima facie case against the appellant.

**[18]** At the end of the defence case, the learned SCJ found that, inter alia: (a) DW1's evidence merely centered around the issue of soil mitigation works undertaken by the appellant which according to him did not require any approval; (b) there was just a denial of the fact that there were earthworks actually carried out by the appellant although they were described as soil mitigation works; (c) these soil mitigation works were actually earthworks which were undertaken without approval from MBPP; and (d) DW1's claim that the appellant was just undertaking soil mitigation works was not consistent with the photographic evidence in exhs P6 and P7. In conclusion, the learned SCJ found that the appellant had failed to raise any reasonable doubt in the prosecution's case and that the prosecution had proven its case against the appellant beyond a reasonable doubt.

THE APPEAL

**[19]** The appellant's petition of appeal appears in Vol 1 of the record of appeal. The petition rest on, inter alia, the following issues:

(a) that the learned SCJ erred in not finding that the act of cutting slopes as expressly stated in the charge was not proven to have been committed on the date specified in the charge ie 18 October 2019;

(b) that the learned SCJ erred in fact and in law finding that the soil mitigation works undertaken by the appellant constituted the act of cutting slopes whereas soil mitigation works do not involve slope cutting works as specifically stated in the charge;

(c) that the learned SCJ erred in fact and in law in failing to find that exh D15 showed that MBPP had accepted that the works undertaken by the appellant were soil mitigation works;

(d) that the learned SCJ erred in fact and in law in finding that the appellant had failed to challenge the prosecution witnesses on the issues raised;

(e) that the learned SCJ erred in fact and in law in failing to adequately consider the evidence of DW1 and exh D17 as evidence that slope cutting works were undertaken at the time when the quarry was in operation and thereby raising a reasonable doubt on the prosecution's case;

(f) that the learned SCJ had erred in fact and in law when applying the wrong standard of proof at the end of the defence case where the learned SCJ found that the appellant 'had failed to raise on the balance of probabilities a reasonable doubt in the prosecution's case'; and

(g) that the learned SCJ erred in finding that a prima facie case was established by the prosecution at the end of the prosecution case and that the prosecution had successfully proven its case against the appellant beyond a reasonable doubt at the end of the trial;

HEARING OF THE APPEAL

*Submissions by appellant*

**[20]** At the hearing of the appeal, submissions were presented based on the points stated in the petition of appeal. The submissions were made along the following issues: (a) that the prosecution failed to prove that on the date specified in the charge there was in fact earthworks involving cutting of slopes being undertaken by the appellant; (b) that the works undertaken by the appellant were actually soil mitigation works which did not include cutting of slopes; (c) that exh D17 proved that the quarry which had operated on the lands were approved by the authorities; (d) that the approved quarry works necessarily included slope cutting works and therefore were not illegal; (e) that P2 and P3 agreed that what they saw were remnants left by slope cutting works done during the operation of the quarry and not actual slope cutting works undertaken by the appellant on the date specified in the charge; (f) that exh D15 proved that MBPP had accepted that the earthworks undertaken by the appellant were soil mitigation works and not slope cutting works; and (g) there was a miscarriage occasioned on the appellant caused by the error on the part of the learned SCJ in applying the wrong standard of proof at the end of the defence case.

*Submissions by respondent*

**[21]** In countering the issues raised by the appellant, the respondent submitted, inter alia, that: (a) the elements of the offence was sufficiently proven in that the appellant is the registered owner of the lands and that the appellant did carry out earthworks involving cutting of slopes without the approval of MBPP; (b) the act of cutting slopes were proven through the evidence of PW2, PW3, PW4 and exhs P6 and P7; (c) letters exhs D15 and D16 confirmed that the appellant had undertaken earthworks without the approval of MBPP; (d) exh D17 was irrelevant since that document was prepared as an environmental audit report on the operations of the quarry; and (e) any error by the learned SCJ in applying the correct burden of proof at the conclusion of the trial did not prejudice the appellant.

A THE LAW RELATING TO APPEALS

**[22]** In *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897, Zawawi Salleh JCA (as he then was) had clearly set out the principles pertaining to the powers of an appellate court:

> [4] ... We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
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> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
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> (c) the trial judge has completely overlooked the inherent probabilities of the case;
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> (d) that the course of events affirmed by the trial judge could not have occurred;
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> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
>
> (f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,
>
> then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

G DELIBERATIONS BY THIS COURT

*On s 70A of the Act*

H **[23]** Section 70A(1) and (9) of the Act states as follows:

> (1) No person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto.
>
> ...
>
> (9) Any person who contravenes any provision of this section or fails to comply with any direction or order given under this section or does any act to obstruct in any manner whatsoever the entry or the execution of any work authorised to be effected

or executed under this section by or on behalf of the local authority shall upon conviction be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both, and in the case of a continuing offence to a fine which may extend to five hundred ringgit for every day during which the offence is continued.

**[24]** Section 70A(18) of the Act defines 'earthworks' as follows:

In this section and in any by-laws made thereunder the word 'earthworks' includes any act of excavation, levelling, filling with any material, piling, the construction of foundations, or felling of trees, on any land, or any other act of dealing with or disturbing any land.

**[25]** In the case of *Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai* [2019] MLJU 1172; [2020] 1 CLJ 34 the Federal Court had the occasion to deliberate on the application of s 70A of the Act to quarry activities:

[63] Under the scheme of the 1974 Act, an important point to note is that as the authority responsible for granting earthworks plan approval, the respondent is responsible for controlling, supervising and regulating the manner in which earthworks are carried out and to ensure that the landowner at all times complies with the procedural conditions imposed. This is an important and crucial point which we must look closely.

[65] We note in this regard that during the Parliamentary Debate in relation to the amendment to introduce s 70A of the 1974, it was emphasised by the Minister that s 70A would be applicable to the mining industry for the purposes of controlling environmental pollution (see the relevant extracts from the Parliamentary Reports (Hansard) in Penyata Rasmi Parliament dated 3 May 1974, pp 1561–1562). In short, the 1974 Act provides the foundation for the development of an effective, efficient and competitive regulatory environment for the street, drainage and building sector including mining industry.

[68] Simply put, s 70A in our opinion is regulatory and not prohibitory, in that it only regulates the procedure for carrying out earthworks. Section 70A does not prohibit earthworks absolutely. Clearly the total effect of this section is regulating not only the appellant but also others who carry out any earthworks including quarry activities. It imposes the procedure for carrying out earthworks including quarry activities.

**[26]** It is clear from the Federal Court's decision notwithstanding that the operation of a quarry is approved by a different authority, namely the Department of Penang Land and Mines, all earthworks including those carried out by quarry operators are subject to the approval of the local authority which in that decision was the Majlis Perbandaran Seberang Perai.

*On the issue of undertaking illegal earthworks and cutting of slopes*

**[27]** Reverting to the present appeal, it is evident that the appellant was and is at all material times the registered owner of the lands. Notwithstanding that the environmental audit report (exh D17) shows that the quarry was operated by a different entity, namely Sharilaris Sdn Bhd, all operations at the quarry including any earthworks must have been undertaken with the permission of the appellant as the registered owner of the lands. Thus, s 70A of the Act applies to the appellant whether or not the quarry was actually operated by the appellant.

**[28]** The issue raised by learned counsel for the appellant is that on the date specified in the charge there were no earthworks, in particular cutting of slopes undertaken by the appellant or with their permission. Since the actus reus of the alleged offence is absent and not proven thus there was no offence committed on that date. It was contended all that PW2 and PW3 saw were remnants of the quarry works which included slope cutting. Since s 153(1) of the Criminal Procedure Code requires that a charge shall contain particulars as to the time of the offence, the absence of the actus reus on 18 October 2019 does not support the charge.

**[29]** In considering this issue this court must consider the purpose and objective of s 70A of the Act. Reference is first made to s 17A of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989). Section 17A clearly states that in the interpretation of a provision of an Act:

> ... a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

**[30]** As held by the Federal Court in *Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai* the purpose of s 70A of the Act is to regulate and supervise earthworks. Referring again to the decision of the Federal Court delivered by His Lordship Azahar Mohamed CJ (Malaya):

> [67] It can be seen from the foregoing analysis that if one looks at the matter as a question of principle and policy, for all intents and purposes, s 70A relates to the regulation and supervision of earthwork activities. The point which has a strong bearing on this issue is that the approval of earthwork plans is required to enable the respondent as the local authority to control, regulate and supervise operations such as supervision of hill slope cutting, supervision of hill gradients; supervision of cleanliness; supervision of public safety; supervision of the water, silt and sediment flow; and supervision of the boundaries and the interests of adjoining landowners. Since earthworks directly threaten physical harm to persons or property, and may undoubtedly touch on numerous aspects of human life and is capable of giving rise to considerable environmental impacts, as the controlling authority, the respondent

is empowered to grant or withhold granting earthworks plan approval or imposing certain legal limitations on the land. Unmistakably, the respondent has a public policy interest in controlling the earthworks.

**[31]** Therefore, s 70A of the Act makes any earthwork which were carried out or permitted to be carried out without an approval from MBPP, illegal work. In this court's view the words '… permit to be commenced or carried out any earthworks …' are not restricted only to works that are found to being actively carried out on the date of specified in a charge but also includes works that are found by the authorities on that date to have been carried out or permitted to be carried out by the owner of the land or its contractor. It is common knowledge that many earthworks that had consequently caused siltation of rivers and drainage systems which led to floods or that had caused movement of soil which led to landslides were carried out on private lands or by private project developers. Such works were not known to the authorities until such disasters happened and investigations carried out. In such cases, if the prosecution is restricted to only proving that the alleged illegal earthworks by the land owner or contractor was undertaken on the date of the disaster then many such parties would be able to escape the provisions of the law unscathed since the works were undertaken at some earlier date. The objective of s 70A of the Act to protect the environment and the public against illegal earthworks would then be frustrated. Therefore, in this court's view it must be the intention of the legislators that the provision of s 70A of the Act as a measure to control illegal earthworks that may pose risks to the environment and the public operates to cover not only illegal earthworks that are found actually being done on the date specified in the charge but also extends to similar works done before its discovery. Only then would the law be effective in deterring would be offenders from committing such offence. It is sufficient for the prosecution to prove that on the date of the charge illegal earthworks were permitted to be carried by the land owner or his contractor whether such works were found actively being carried out on that date or had been carried out and completed at some earlier date. In the latter case, the discovery of the illegal earthworks on the date as specified in the charge would constitute the date of the offence.

**[32]** Hence, this court finds no cause to find that the charge in this appeal is wrong in law for want of evidence of any earthworks actually undertaken by the appellant on the date specified in the charge.

**[33]** Guided also by the decision in *Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai* this court holds that notwithstanding that the operations of a quarry on the lands may have been legally approved and may involve ancillary earthworks such as cutting of slopes, those works are still subject to the jurisdiction and approval of the MBPP. The argument that since

A the quarry was legally operated and hence earthworks carried out ancillary to it are equally legal without need for compliance with the requirements of s 70A of the Act, therefore holds no water.

B **[34]** Based on the above and the evaluation of the evidence of PW2, PW3, PW4 and exhs P6, P7, P10 and P11, this court finds no fault with the decision of the learned SCJ at the end of the prosecution case that a prima facie case was proven against the appellant in that: (a) there were illegal earthworks; (b) those illegal earthworks involved cutting of slopes; and (c) the illegal earthworks were recent and not just remnants of the quarry operations. This court would add that PW2 and PW3 are qualified geotechnical engineers whose experience and views in that field must be given their proper relevance and weight. No suggestion was made that their findings were maliciously manufactured against the appellant. They had also given clear and consistent evidence that the earthworks carried out by the appellant were not soil mitigation works as claimed by the appellant.

**[35]** Overall, their evidence were not challenged by some engineering expert's view or report which could have raised doubts on their findings. For that reason this court does not find that exhs D15 and D16 aids the appellant in raising a doubt in the prosecution's case. This court accepts PW3's explanation that the Covid-19 pandemic did not obstruct the appellant from continuing to submit all required plans for approvals since they could have been submitted online.

**[36]** In evaluating the appellant's case at the defence stage, it is an inescapable observation that SD1 is not a qualified engineer whose evidence could have posed some credible challenge to the evidence of PW2 and PW3. He was just a site manager at the Teluk Bahang Quarry when the quarry was still in operation until sometime in 1998. In that respect, this court could not find disagreement with the learned SCJ's assessment that SD1's evidence had failed to raise any challenge to the prosecution's version of the case. In this court's view exh D17 was not relevant in challenging the prosecution's case. As argued by the respondent, that document was just an environmental audit report issued when the quarry was still in operation. That document at most supported the fact that there was a quarry in operation on the lands. It is not however capable of explaining away the illegal earthworks and slope cutting that were undertaken on the lands.

**[37]** This court also finds that SD1's oral evidence that the slope cutting discovered by PW2 and PW3 were actually remnants of the quarry operations that had since ceased not supported by any other evidence. No witness with qualifications equivalent to PW2 and PW3 was called to challenge the findings of PW2 and PW3 that: (a) the works discovered by them are not earthworks

within the meaning of s 70(18) of the Act; (b) that they were wrong in finding that the earthworks were cutting of slopes; and (c) that the alleged earthworks were not new. In fact, SD1 admitted that the slope cutting was done during the operation of the quarry.

**[38]** This court could not agree with SD1's evidence that the soil mitigation works undertaken at the relevant time did not require any approval from MBPP. Based on the findings of the learned SCJ at the end of the prosecution's case, this court finds no reason to agree with the appellant that exhs D15 and D16 proved that there was no earthworks involving slope cutting and that in any event the earthworks were actually soil mitigation works. It is pertinent to note that at the conclusion of his re-examination SD1 agreed that earthworks were in fact carried out on the lands.

**[39]** Thus, in this court's view there was no credible defence to the charge and SD1's sole evidence could not raise any reasonable doubt in the prosecution's case. For those reasons, this court cannot disagree with the findings of the learned SCJ at the end of the trial that the appellant had failed to raise any reasonable doubt in the prosecution's case. As decided in *Azhar bin Lazim v Public Prosecutor* [2012] 5 MLJ 1; [2012] 1 LNS 262:

> [27] A credible defence is a defence that answers the evidence of the prosecution. It is purely a question of fact whether the explanation of the defence is capable of raising a reasonable doubt. All too often, and the present appeal is not an exception, the accused is condemned by his own conduct (*Public Prosecutor v Reza Mohd Shah Ahmad Shah* [2002] 4 MLJ 13; [2002] 1 LNS 157; *Krishna Rao Gurumurthi v Public Prosecutor and Another Appeal* [2009] 2 CLJ 603 (FC); *Amathevelli P Ramasamy v Public Prosecutor* [2009] 3 CLJ 109 (FC); and *Public Prosecutor v Lim Hock Boon* [2009] 3 CLJ 430; [2009] 2 AMR 768 (FC)). It is necessary for the accused to explain his conduct.

**[40]** It behoves upon this court to also state that apart from failing to raise any reasonable doubt in the prosecution's case, the appellant had also failed to rebut on the balance of probabilities the presumption of permission by the land owner under s 70A(14) of the Act that provides:

> Where any earthworks are commenced or carried out, the owner of the land on which such earthworks are commenced or carried out shall be deemed to have permitted such earthworks to be commenced or carried out.

*On the issue of standard of proof*

**[41]** Finally on the issue of whether the learned SCJ had applied the wrong standard of proof at the end of the trial, this court agrees that words used by the learned SCJ had caused confusion on what exactly was the standard of proof applied by him. It is established law that needs no repeating that the legal

burden of proof of an accused at the end of the trial is to just raise a reasonable doubt in the prosecution's. By employing the words ' ... had failed to raise on the balance of probabilities a reasonable doubt in the prosecution's case' the learned SCJ had wittingly or unwittingly fused two different legal burdens of proof on the appellant, that is: (a) raising a reasonable doubt; and (b) on a balance of probabilities. It is obvious that employing the latter raises the burden of the appellant's burden to one that is higher than just raising a reasonable doubt (see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ). On that premise, this court agrees that there was indeed a misdirection by the learned SCJ.

**[42]** In evaluating this issue this court adopts the approach taken by the Federal Court in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381 and the Court of Appeal in *Public Prosecutor v Ishak bin Hj Shaari & other appeals* [2003] 4 MLJ 585; [2003] 3 CLJ 843. In the former, the Federal Court held:

> So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 exemplifies the general rule, while that in *Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265; [1994] 2 CLJ 151 illustrates the exception.
>
> Having scrutinised the record with care, we are satisfied that this is an appropriate case for the application of the proviso. The evidence, both direct and circumstantial, against the appellants is entirely overwhelming. A court applying s 37(da) in the manner required by *Muhammed bin Hassan* would have nevertheless convicted the appellants on the available evidence.

**[43]** In the latter, the Court of Appeal held:

> [32] On the above authorities, on the record of appeal, the SCJ failed to make a finding on the credibility or otherwise of SP6 and SP11 before ruling that a prima facie case has been made out which amounted to a misdirection. However, we were of the view that this misdirection did not result in any miscarriage of justice based on the totality of the evidence at the end of the trial. An appellate court retains a discretion to dismiss an appeal even there is a misdirection if it is of the opinion that no substantial miscarriage of justice has occurred. This discretion accorded to an appellate court is codified in the Courts of Judicature Act 1964, specifically s 92(1) and the proviso to s 60(1): *Ghasem Hozouri Hassan v Public Prosecutor* [2018] MLJU 601; [2018] 6 CLJ 133 (FC); see also *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381.

**[44]** Applying those principles, this court does not find that the appellant had suffered any miscarriage of justice. The learned SCJ had evaluated all the evidence as required of him as the trial judge and the appellant had received a fair trial. Applying the correct standard of proof this court is satisfied as decided by the learned SCJ that the appellant had failed to raise any reasonable doubt in the prosecution's case at the conclusion of the trial and that the prosecution had proven its case beyond a reasonable doubt against the appellant in accordance with the charge.

DECISION

**[45]** In conclusion, after hearing all arguments presented before this court and based upon the deliberations set out above, this court finds no cause to disagree with the decision of the learned SCJ in convicting the appellant at the end of the trial and in passing the sentence as he did. The appeal against conviction and sentence is therefore denied. Both conviction and sentence are thereby affirmed.

*Appeal dismissed; appellant's conviction and sentence affirmed.*

Reported by Mohd Kamarul Anwar